

Dien v Seltzer

2012 NY Slip Op 33244(U)

January 4, 2012

Supreme Court, New York County

Docket Number: 008466/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 14

X

JANE C. DIEN and JEFFREY DIEN,

Plaintiffs,

Index No.: 008466/10

Motion Sequence...03

-against-

Motion Date...10/05/11

NEAL SELTZER, JEFFREY S. REIN, LONG
ISLAND SMILE and MARTIN SHEAR,

Defendants.

X

Papers Submitted:

- Order to Show Cause.....X
- Affirmation in Support.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the Order to Show Cause brought pursuant to CPLR § 3101 (a) by the Defendants, NEAL SELTZER, JEFFREY S. REIN and LONG ISLAND SMILE (hereinafter "moving Defendants") seeking to vacate the ruling of this Court dated August 12, 2011 and to compel a further deposition of the Plaintiff, Jane C. Dien, is decided as provided herein.

In ruling on the issue of whether the Plaintiff, Jane C. Dien, might be questioned at her deposition regarding her conversations/consultations with family friend/

expert witness/non-party dentist, Lawrence Rothenberg, this court stated that questions might properly be asked *vis-a-vis* what Mrs. Dien said to him and what he said to her in his role as a consultant. Although, the court ruled that the Plaintiff, Jane C. Dien, might also be questioned as to what she said to Dr. Rothenberg in his capacity as an expert, the substance of the remarks he made to her as an expert, however, were to be the subject of motion practice.

In moving to compel the further deposition of the Plaintiff, Jane C. Dien, and to vacate that part of the court's ruling that precluded the Defendants from questioning said Plaintiff as to statements made by Dr. Rothenberg while wearing his proverbial "expert hat", the moving Defendants argue that statements made by Dr. Rothenberg as a subsequent treating dentist are discoverable whether or not Dr. Rothenberg was subsequently designated as an expert witness. They further maintain that since the Plaintiff, Jane C. Dien, placed her medical condition in controversy, she cannot avoid disclosure of any information that bears upon her medical condition.

The Plaintiffs oppose¹ the moving Defendants' application predicated on the grounds that Dr. Rothenberg, a personal friend of the Plaintiffs, never treated the Plaintiff, Jane C. Dien, as a patient and, commencing in October 2009, she consulted Dr. Rothenberg at the direction and request of her prior attorney. The Plaintiffs contend that conversations

¹In the interests of judicial economy and in the absence of any prejudice, the court declines to reject the Plaintiffs' opposition papers which were served by regular rather than overnight mail.

which took place after October 2009 were related to the contemplated and non-pending litigation and are privileged. Generally, according to the Plaintiffs, the conversations at issue fall into three categories to wit: a) discussions regarding Dr. Rothenberg's review of her records in contemplation of a lawsuit; b) discussions regarding personal matters arising out of their friendship; and c) discussions on how the Plaintiff was feeling during the course of her treatment for tongue cancer.

CPLR § 3101 (a) sets forth the criterion for disclosure under the CPLR, requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action." Requests for disclosure, however, may not be overbroad, burdensome, or lacking in specificity and they may not seek irrelevant information. *Osowski v. AMEC Constr. Mgt., Inc.*, 69 A.D.3d 99, 106 (1st Dept. 2009). The words material and necessary are to be liberally interpreted to "require disclosure, upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." The test to determine if the information sought is material and necessary is one of usefulness and reason." *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-407 (1969).

The principle of full disclosure does not, however, give a party the right to uncontrolled and unfettered disclosure. Matters relating to disclosure lie within the broad discretion of the trial court which is in the best position to determine what is material and necessary. *Buxbaum v. Castro*, 82 A.D.3d 925 (2d Dept. 2011).

CPLR § 3101 (d) (2) provides that:

“material otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that party’s representative (including an attorney, consultant, surety, indemnitor, insurer or agent) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. * * * [T]he court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.”

Clearly, conversations between the Plaintiff, Jane C. Dien, and Dr. Rothenberg regarding personal matters arising out of their friendship, and regarding how the Plaintiff was feeling during her treatment, are neither material nor relevant to the defense of the action. To the extent that their conversations related to Dr. Rothenberg’s review of her dental records and his opinions *vis-a-vis* her claim, the substance of his remarks fall under the umbrella of CPLR § 3101 (d) (2) as material prepared for litigation. The Defendants, therefore, are precluded from discovery of such remarks.

The Court finds no basis, therefore, to vacate the ruling at issue or to compel the Plaintiff, Jane C. Dien, to answer questions regarding the substance of these remarks.

Accordingly, it is hereby

ORDERED, that the the Order to Show Cause brought pursuant to CPLR § 3101 (a) by the Defendants, NEAL SELTZER, JEFFREY S. REIN and LONG ISLAND SMILE seeking to vacate the ruling of this Court dated August 12, 2011 and to compel a further deposition of the Plaintiff, Jane C. Dien, is **DENIED**.

This constitutes the decision and Order of the court.

DATED: Mineola, New York
January 4, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED
JAN 06 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE